

Ever closer union... are you serious?

Part II

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“I love argument, I love debate. I don’t expect anyone just to sit there and agree with me, that’s not their job.” – Margaret Thatcher



In

the aftermath of Britain’s big bargaining many [politicians](#) and [legal scholars](#) told us that the envisaged scrapping of this ‘catch phrase’ for the UK amounted to little besides the fact that the EU was finally coming to terms with the uniqueness of British membership. The factual background of this uniqueness is of course undisputed and exemplified by the scholarly horrors one endures trying to explain the technicalities – logic would be too much of a word here – of the existing British opt-outs and re-opt-ins.

Be that as it may, what is striking about the framing of the UK’s exemption from an ever closer union is that we were not only told that this change does not only reflect a realistic rationalization of the UK’s EU membership, but moreover that the phrase itself bears no legal meaning. [The conclusion](#) to this end actually sets out that “[t]he references in the Treaties and their preambles to the process of creating an ever closer union among the peoples of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties.” And the reference likewise doesn’t stand in the way of a differentiated integration of only some of the Member States. This in principle, one could conclude, reads like an affirmation of the already known: the EU is bound by the principle of conferral, enhanced cooperation efforts are per se in line with the underlying spirit of European integration and no Member State can against this backdrop be forced into some sort of deeper integration. So, why then you might ask, is it that the very same text sets out, that in light of the specific situation the UK already enjoys, one more exemption is needed “so as to make it clear that the references to ever closer union do not

apply to the United Kingdom.” To overcome this logical miasma – turning on the question of whether or not the exemption of an ever closer union isn’t all but legally irrelevant – one could of course always go back to the quixotic rhetorics of populist politics: “Just sayin...”

More than a feeling...

My colleague and I do however think that there is a bigger point behind all this. The reference to an ever closer union among the peoples of Europe, we think, bears legal meaning, substantive legal meaning. It is indeed woven into the EU’s DNA and underpins the understanding that the EU is and was never meant to be a purely functionalistic international vehicle. Neither the establishment of a common market nor the Area of Freedom, Security and Justice was or is its ultimate purpose. The notion rather reflects a commitment to establish a common overarching European polity. That said, it seems worth remembering that the rationale for joining the EU in all Member States – [arguably even the UK](#) – relied on the narrative that membership meant more than just becoming part of an economic enterprise. The reference thus forms the very basis of the constitutional alignment of and within the European Union. The essential element of this conception is however not, as was suggested, some sort of European finalité but rather the character of the union as a transcending polity founded on equality, the rule of law and mutual trust. The material question of what the EU is to do, and what it is to become is therefore quite another one. Put very simply the reference to an ever closer union could hence be understood as an emanation of the underlying spirit that the EU is an egalitarian union by the peoples and for the peoples of the Member States.

This spirit is of course –as outlined in the conclusions, longstanding practice and not least the instrument of enhanced cooperation – not contradicted by differentiated paths to integration, as long as the measures taken by some Member States are taken in line with the Treaties and allow for a later opt-in. Unlike previous opt-outs the envisaged British sovereignty demands are however not intended to establish that the UK will – for the time being – not take part in a specific field of policy, but rather [purport to re-set the UK’s membership on its own terms](#). So while the rest of the 28 Member States will remain bound by the conception of the European Union as a common endeavor, Britain is aiming to dwarf down its own membership to a matter of ‘rational cherry picking’. And albeit the specifics of this ‘re-configuration’ are still to be hammered out one wonders if any such ‘half’, ‘limited’ or whatever you’d like to call it membership is compatible with the spirit of the EU.

Interestingly enough, likeminded à la carte concepts have been suggested by two former British Prime Ministers. ... Still guessing ? Well, here is a hint: she was iron, while he really wasn’t majorly tough. Jean-Claude Piris, by the way, concluded that these ideas appeared “[to go into a direction that is opposed to the very basic principles on which the EU is built](#)” and therefore opted not to entertain the idea of an à la carte approach in his book ‘The Future of Europe’.

What should be obvious from the aforesaid is that the proposed changes to the UK’s membership aspirations are indeed not about incorporating yet another more

differentiated path to European integration but [lay bare diverging concepts](#) of European integration and the European Union as such.

Of Treaties and Spirits

Legally one might argue that the spirit of the EU is inherently linked to the phrase of an ever closer union and as such part of the essential characteristics of the EU that are “[indispensable to the preservation of the very nature of the law established by the Treaties](#)”. And though some (Austrian) people might like the idea of adding another layer of constitutional hierarchy to the Treaties, other people(s) might not believe in it. The Member States are after all the Masters of the Treaties: And the Treaties are for changing.

Sovereignty meets sovereignty

Treaties are however only one thing. The EU is, as various constitutional courts have pointed out, a polity built on the premises of national constitutional endowments. What the EU is, and moreover, what it can be, is ring-fenced by national constitutional imperatives. The German Constitutional Court, for example, has most famously held that the EU is a “[Staatenverbund](#)” but cannot, despite all the ‘European-friendliness’ of the German Grundgesetz, be made into a [sovereign State](#). National understandings of the EU, of course, don’t come into existence out of the blue, but are informed by the ‘internalization’ of the EU’s legal order, which implies that also the conception of an ever closer union is somehow part of the national understanding.

The understanding of the EU as an ever closer union might however, at least in some cases, run even deeper. The bespoke ‘European-friendliness’ of the Grundgesetz, for example, [obliges Germany](#) to take part in the realization of a united Europe, [which is meant](#) and interpreted as a reference to the idea of an ever closer union. But even for a more egocentric constitutional order like the Austrian one it could be argued that membership in the EU is premised on the underlying character of the EU as a polity, striving to be an ever closer union: That is to argue, that the total revision of the Austrian constitutional order did not only bring about the necessary changes to open up the fundamental constitutional principles for membership in the EU but indeed meant incorporating membership in an ever closer union into those constitutional fundaments.

Although Mr. Cameron might not be so happy to hear this, this could mean that British sovereignty aspirations might get to meet rather different constitutional understandings of what the European Union is all about. Sovereignty meets Sovereignty – Maggie would have loved it, wouldn’t she?

